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FEB 24 2009

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**Board of Vocational Nursing
and Psychiatric Technicians**

9 **BEFORE THE**
10 **BOARD OF VOCATIONAL NURSING AND PSYCHIATRIC TECHNICIANS**
11 **DEPARTMENT OF CONSUMER AFFAIRS**
12 **STATE OF CALIFORNIA**

12 In the Matter of the Accusation Against:

Case No. VN-2007-2887

13 THOMAS WILLIAM CHERRY

24221 Twig Street

14 Lake Forest, CA 92630

ACCUSATION

15 Vocational Nurse License No. LVN 191823

16 Respondent.

17
18 Complainant alleges:

19 **PARTIES**

20 I. Teresa Bello-Jones, J.D., M.S.N., R.N. (Complainant) brings this Accusation
21 solely in her official capacity as the Executive Officer of the Board of Vocational Nursing and
22 Psychiatric Technicians, Department of Consumer Affairs.

23 2. On or about May 19, 2000, the Board of Vocational Nursing and Psychiatric
24 Technicians issued Vocational Nurse License Number LVN 191823 to Thomas William Cherry
25 (Respondent). The Vocational Nurse License was in full force and effect at all times relevant to
26 the charges brought herein and will expire on August 31, 2009, unless renewed.

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JURISDICTION

3. This Accusation is brought before the Board of Vocational Nursing and Psychiatric Technicians (Board), Department of Consumer Affairs, under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 2875 of the Business and Professions Code (Code) provides, in pertinent part, that the Board may discipline the holder of a vocational nurse license for any reason provided in Article 3 (commencing with section 2875) of the Vocational Nursing Practice Act.

5. Section 118, subdivision (b) of the Code provides, in pertinent part, that the expiration of a license shall not deprive the Bureau jurisdiction to proceed with a disciplinary action during the period within which the license may be renewed, restored, reissued or reinstated. Under section 2892.1 of the Code, the Bureau may renew an expired license at any time within four years after the expiration.

STATUTORY PROVISIONS

6. Section 490 of the Code provides, in pertinent part, that the Board may suspend or revoke a license when it finds that the licensee has been convicted of a crime substantially related to the qualifications, functions or duties of a licensee.

7. Section 2878 of the Code states:

The Board may suspend or revoke a license issued under this chapter [the Vocational Nursing Practice Act (Bus. & Prof. Code, 2840, et seq.)] for any of the following:

(a) Unprofessional conduct, which includes, but is not limited to, the following:

....

(f) Conviction of a crime substantially related to the qualifications, functions, and duties of a licensed vocational nurse, in which event the record of the conviction shall be conclusive evidence of the conviction.

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1 8. Section 2878.5 of the Code states:

2 In addition to other acts constituting unprofessional conduct within the
3 meaning of this chapter [the Vocational Nursing Practice Act] it is unprofessional
4 conduct for a person licensed under this chapter to do any of the following:

5

6 (b) Use any controlled substance as defined in Division 10 of the Health
7 and Safety Code, or any dangerous drug as defined in Section 4022, or alcoholic
8 beverages, to an extent or in a manner dangerous or injurious to himself or
9 herself, any other person, or the public, or to the extent that the use impairs his or
10 her ability to conduct with safety to the public the practice authorized by his or
11 her license.

12 (c) Be convicted of a criminal offense involving possession of any
13 narcotic or dangerous drug, or the prescription, consumption, or
14 self-administration of any of the substances described in subdivisions (a) and (b)
15 of this section, in which event the record of the conviction is conclusive evidence
16 thereof.

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18 9. Section 2878.6 of the Code states:

19 A plea or verdict of guilty or a conviction following a plea of nolo
20 contendere made to a charge substantially related to the qualifications, functions
21 and duties of a licensed vocational nurse is deemed to be a conviction within the
22 meaning of this article. The board may order the license suspended or revoked, or
23 may decline to issue a license, when the time for appeal has elapsed, or the
24 judgment of conviction has been affirmed on appeal or when an order granting
25 probation is made suspending the imposition of sentence, irrespective of a
26 subsequent order under the provisions of Section 1203.4 of the Penal Code
27 allowing such person to withdraw his plea of guilty and to enter a plea of not
28 guilty, or setting aside the verdict of guilty, or dismissing the accusation,
information or indictment.

 10. California Code of Regulations, title 16, section 2521, states:

 For the purposes of denial, suspension, or revocation of a license pursuant
to Division 1.5 (commencing with Section 475) of the Business and Professions
Code, a crime or act shall be considered to be substantially related to the
qualifications, functions or duties of a licensed vocational nurse if to a substantial
degree it evidences present or potential unfitness of a licensed vocational nurse to
perform the functions authorized by his license in a manner consistent with the
public health, safety, or welfare. Such crimes or acts shall include but not be
limited to those involving the following:

 (a) Procuring a license by fraud, misrepresentation, or mistake.

 (b) A conviction of practicing medicine without a license in violation of
Chapter 5 of Division 2 of the Business and Professions Code.

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1 (c) Violating or attempting to violate, directly or indirectly, or assisting in
2 or abetting the violation of, or conspiring to violate any provision or term of
Chapter 6.5, Division 2 of the Business and Professions Code.

3 (d) Aiding or assisting, or agreeing to aid or assist any person or persons,
4 whether a licensed physician or not, in the performance of or arranging for a
violation of any of the provisions of Article 13, Chapter 5, Division 2 of the
5 Business and Professions Code.

6 (e) Conviction of a crime involving fiscal dishonesty.

7 (f) Any crime or act involving the sale, gift, administration, or furnishing
8 of "narcotics or dangerous drugs or dangerous devices" as defined in Section
4022 of the Business and Professions Code.

9 11. California Code of Regulations, Title 16, section 2522 states:

10 When considering a) the denial of a license under Section 480 of the
11 Business and Professions Code, b) the suspension or revocation of a license on
the ground that a licensee has been convicted of a crime, or c) a petition for
12 reinstatement of a license under Section 2787.7 of the Business and Professions
Code, the Board in evaluating the rehabilitation of an individual and his or her
13 present eligibility for a license, will consider the following criteria:

14 (1) Nature and severity of the act(s), offense(s), or crime(s) under consideration

15 (2) Actual or potential harm to the public.

16 (3) Actual or potential harm to any patient.

17 (4) Overall disciplinary record.

18 (5) Overall criminal actions taken by any federal, state or local agency
or court.

19 (6) Prior warnings on record or prior remediation.

20 (7) Number and/or variety of current violations.

21 (8) Mitigation evidence.

22 (9) In case of a criminal conviction, compliance with terms of
sentence and/or court-ordered probation.

23 (10) Time passed since the act(s) or offense(s) occurred.

24 (11) If applicable, evidence of proceedings to dismiss a conviction
25 pursuant to Penal Code section 1203.4.

26 (12) Cooperation with the Board and other law enforcement or
regulatory agencies.

27 (13) Other rehabilitation evidence.

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1 12. Section 125.3 of the Code provides, in pertinent part, that the Board may request
2 the administrative law judge to direct a licensee found to have committed a violation or
3 violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation
4 and enforcement of the case.

5 **FIRST CAUSE FOR DISCIPLINE**

6 **(May 19, 2008 Criminal Conviction for DUI on May 14, 2006)**

7 13. Respondent has subjected his license to disciplinary action under sections 490 and
8 2878, subdivision (f) of the Code in that Respondent was convicted of a crime that is
9 substantially related to the qualifications, functions, and duties of a licensed vocational nurse.
10 The circumstances are as follows:

11 a. On or about May 19, 2008, in a criminal proceeding entitled *People of the*
12 *State of California v. Thomas William Cherry*, in Orange County Superior Court, case no.
13 06HM08112, Respondent was convicted on his plea of guilty of violating Vehicle Code sections
14 23152, subdivision (b), driving with a blood alcohol content (BAC) over 0.08 or more; and
15 12500, subdivision (a), driving without a valid driver's license, misdemeanors. The counts were
16 enhanced in that Respondent had a BAC of 0.20 or more. It was further alleged that Respondent
17 was previously convicted of driving under the influence of alcohol on May 3, 2004, in Orange
18 County Superior Court case no. 04HM01517.

19 b. As a result of the conviction, on or about May 19, 2008, Respondent was
20 sentenced to serve 75 days in the Orange County Jail (converted to supervised electronic
21 confinement), three years informal probation, attend and complete an 18-month Multiple
22 Offender Alcohol Program and a MADD Victim's Impact Panel. Respondent's driver's license
23 was suspended for three years and he was ordered to pay \$657.00 in fines, fees, and restitution,
24 plus restitution to the victim.

25 c. The facts that led to the conviction were that on or about the evening of
26 May 14, 2006, deputies from the Orange County Sheriff's Department were called to an injury
27 vehicle collision in Lake Forest. Fire department personnel who responded to the scene
28 remarked that Respondent's breath had a strong odor of alcoholic beverage. Respondent was

1 transported to a local hospital where he was interviewed by a sheriff's deputy. The deputy noted
2 that Respondent's eyes were bloodshot, his speech was slurred, and he appeared confused and
3 disoriented. Respondent admitted drinking at a bar prior to the accident; he did not
4 remember leaving the bar and had no memory of the accident. Respondent's blood was drawn
5 and subsequently tested, where it registered a BAC of 0.25.

6 **SECOND CAUSE FOR DISCIPLINE**

7 **(Unprofessional Conduct - Use of Alcohol in a Dangerous Manner)**

8 14. Respondent has subjected his license to disciplinary action under section
9 2878.5, subdivision (b) of the Code in that on or about May 14, 2006, he drove a motor vehicle
10 when very intoxicated, as detailed in paragraph 13, above. In Respondent's plea agreement, he
11 stated: "On or abt. 5-14-06 in O.C. I willfully & unlawfully drove a motor vehicle with a blood
12 alcohol level of .25% and I was driving without a license. On or abt. 5-14-06 I was also driving
13 with a prior DUI conviction case #04HM01517." Respondent's alcohol use was dangerous and
14 resulted in an injury collision.

15 **THIRD CAUSE FOR DISCIPLINE**

16 **(Unprofessional Conduct - Conviction of an Alcohol-Related Crime)**

17 15. Respondent has subjected his license to disciplinary action under section
18 2878.5, subdivision (c) of the Code in that on or about May 14, 2006, as detailed in paragraph
19 13, above, Respondent's blood alcohol content was measured at 0.25 percent, over three times
20 the legal limit. As a result, on May 19, 2008, Respondent was convicted for driving with a BAC
21 of 0.08 or higher.

22 **DISCIPLINARY CONSIDERATIONS**

23 16. To determine the degree of discipline, if any, to be imposed on Respondent,
24 Complainant alleges the following:

25 a. On or about May 3, 2004, in a prior criminal proceeding entitled
26 *People of the State of California v. Thomas William Cherry*, in Orange County Superior Court,
27 case no. 04HM01517, Respondent was convicted on his plea of guilty for violating Vehicle Code
28 section 23152, subdivision (b), driving with a BAC of 0.08% or more, and Vehicle Code section

1 20002, subdivision (a), hit and run with property damage, misdemeanors.

2 b. As a result of the conviction, Respondent was sentenced to three
3 years informal probation, completion of 10 days CalTrans or Physical Labor work service, and
4 attend and complete a six-month Level II First Offender Alcohol Program and a MADD Victim
5 Impact Panel. Respondent was further ordered not to drive without a valid license, or with a
6 measurable amount of alcohol in his blood. Respondent's driver's license was restricted for 90
7 days, and he was ordered to pay \$597 in fees, fines, and restitution.

8 c. The circumstances that led to the conviction were that on or about
9 the evening of November 17, 2003, deputies from the Orange County Sheriff's Department
10 responded to a cell phone call from a passenger in a vehicle that had been sideswiped by
11 Respondent's vehicle. The victim/reporting party stated that Respondent hit their vehicle and
12 kept driving. The driver and his passenger followed Respondent, flashing their headlights in an
13 attempt to get Respondent to stop. The victim stayed on the cell phone with deputies until the
14 deputies caught up with Respondent and pulled him over. Upon contact with Respondent, the
15 deputy noted that Respondent's eyes were bloodshot, red, and droopy and there was a strong
16 odor of alcoholic beverage emanating from inside the vehicle. Respondent failed the field
17 sobriety tests as demonstrated and explained. A preliminary alcohol screening test resulted in
18 BAC readings of 0.20 and 0.189.

19 17. In a letter to Respondent dated February 1, 2005, the Board advised
20 Respondent that because he was complying with the court's sentence and had no subsequent
21 convictions, the Board would not pursue disciplinary action against him. The Board further
22 admonished Respondent that "Future substantiated reports that you have engaged in similar
23 behavior or otherwise violated the law or regulations governing your practice as a vocational
24 nurse may result in disciplinary action against your license."

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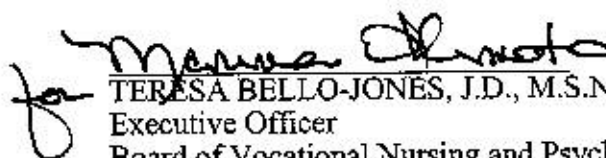
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PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Board of Vocational Nursing and Psychiatric Technicians issue a decision:

1. Revoking or suspending Vocational Nurse License Number LVN 191823, issued to Thomas William Cherry;
2. Ordering Thomas William Cherry to pay the Board of Vocational Nursing and Psychiatric Technicians the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;
3. Taking such other and further action as deemed necessary and proper.

DATED: February 24, 2009


TERESA BELLO-JONES, J.D., M.S.N., R.N.
Executive Officer
Board of Vocational Nursing and Psychiatric Technicians
Department of Consumer Affairs
State of California
Complainant

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